

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ATLANTIC SPECIALTY INSURANCE
COMPANY,

Plaintiff,

v.

GLOBAL PANDA ENTERTAINMENT,
LLC,

Defendant.

Case No. 2:21-cv-01033-GMN-NJK

REPORT & RECOMMENDATION

[Docket No. 25]

Pending before the Court is Plaintiff's motion for entry of default judgment. Docket No. 25. The motion is properly resolved without a hearing. *See* LR 78-1. For the reasons discussed below, the undersigned **RECOMMENDS** that the motion for default judgment be granted.

I. Background

This case arises out of another lawsuit relating to an incident at a live entertainment show operated by Defendant Global Panda on July 1, 2014. Docket No. 1-2 at 2-3. On that date, an attendee at the show, Christopher Scott Sykes, alleges he was hurt by an unknown object falling off the performance stage and striking him in the head. *Id.* at 4-5; *see also* Docket No. 25 at 3. Following the incident, Sykes commenced litigation against Defendant. *Id.* Per the terms of Defendant's existing insurance policy with Plaintiff, Plaintiff "accepted coverage" for Sykes' claim and "hired counsel to defend Global Panda against [his] claims." Docket No. 1 at 3.

The policy at issue required Global Panda to cooperate with Plaintiff in the investigation or settlement of any claims Plaintiff was bound to cover under the insurance policy. This requirement applies to the defense of any suits Plaintiff was bound to assist in defending under the insurance policy. *See* Docket No. 1-3. Since Plaintiff undertook the litigation on Defendant's behalf,

1 Defendant has not only failed to comply with the policy terms but has also refused to comply when
2 directly asked by Plaintiff.¹ Plaintiff alleges that this behavior excuses it from its obligations to
3 Defendant under the terms of the policy. Docket No. 1 at 5.

4 Plaintiff filed the instant action for declaratory relief on June 6, 2021. Docket No. 1. After
5 effectuating service and waiting the 21-day period required by the Federal Rules of Civil Procedure
6 without any action or responsive pleading by Defendant, Plaintiff sought an entry of default.
7 Docket No. 23. Following the Clerk's entry of default on August 17, 2021, Docket No. 24,
8 Plaintiff filed the instant motion for entry of default judgment on August 18, 2021. Docket No.
9 25.

10 **II. The Court's Jurisdiction**

11 "When entry of default judgment is sought against a party who has failed to plead or otherwise
12 defend, a district court has an affirmative duty to look into its jurisdiction over both the subject
13 matter and the parties." *Tuli v. Republic of Iraq*, 172 F.3d 707, 712 (9th Cir. 1999). To ensure
14 that any entered default judgment will not later be attacked as void, the Court must "determine
15 whether it has the power . . . to enter the judgment in the first place." *Id.* Here, both subject matter
16 jurisdiction and personal jurisdiction are satisfied.

17 Plaintiff files its underlying complaint pursuant to the Court's diversity jurisdiction, set forth
18 in 28 U.S.C. § 1332. To satisfy diversity jurisdiction, a plaintiff must establish that the parties are
19 completely diverse from one another and that the amount in controversy exceeds \$75,000. 28
20 U.S.C. § 1332(a). Plaintiff is "a New York corporation with its principal place of business in
21 Plymouth, Minnesota." Docket No. 27 at 1. Defendant is "a revoked Nevada limited liability
22 company." *Id.* Since Plaintiff and Defendant are citizens of different states, the complete diversity
23 requirement is satisfied.

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26 ¹ The Court is not only required to take this factual allegation as true after the entry of
27 default, *see TeleVideo Sys., Inc. v. Heidenthal*, 862 F.2d 915, 917-18 (9th Cir. 1987) (per curiam),
28 but this fact was explicitly found by the Nevada Supreme Court in the underlying litigation.
Docket No. 1-3; *Atlantic Specialty Co. v. The Eighth Judicial Dist. Ct.*, Case No. 81418 (Nev. Sup.
Ct. Mar. 26, 2021).

1 In its complaint, Plaintiff seeks only declaratory relief from the Court and no monetary
 2 damages. In the underlying litigation, damages were initially plead at \$30,000. *See* Docket No. 1-
 3 2. On August 27, 2021, this Court ordered Plaintiff to show cause that the jurisdictional amount
 4 in controversy is satisfied. Docket No. 26. In their response, Plaintiff alleges that the amount in
 5 controversy exceeds \$75,000 because, under the policy in question, Plaintiff is bound to indemnify
 6 Defendant for up to \$1,000,000 in insurance coverage and due to Defendant's nonparticipation in
 7 the underlying litigation, Plaintiff might be liable for a substantially greater sum of money to
 8 Sykes.² *See* Docket No. 27. The Court finds that Plaintiff has shown appropriate cause that the
 9 jurisdictional amount is satisfied in this case. Because the amount in controversy is satisfied, the
 10 Court finds that the Court has subject matter jurisdiction over this matter pursuant to the Court's
 11 diversity jurisdiction. The Court's order to show cause is therefore **DISCHARGED**. Docket No.
 12 26.

13 The Court's personal jurisdiction over a defendant is generally a waivable defense that the
 14 Court does not raise *sua sponte*. *See* Fed. R. Civ. P. 12(h)(1). Nonetheless, "[w]hen entry of
 15 default judgment is sought against a party that has failed to plead or otherwise defend, a district
 16 court has an affirmative duty to look into its jurisdiction over both the subject matter and the
 17 parties." *Tuli v. Republic of Iraq*, 172 F.3d 707, 712 (9th Cir. 1999). Thus, after giving Plaintiff
 18 notice and an opportunity to assert jurisdictional facts, the Court may dismiss an action for lack of
 19 personal jurisdiction. *See id.* at 712–13.

20 Plaintiff bears the burden of showing that Defendant is subject to the forum court's jurisdiction,
 21 which can be satisfied through *prima facie* showing. *See High Tech Pet Prods., Inc. v. Juxin Pet*
 22 *Prod. Co.*, 2013 WL 1281619, *4 (E.D. Cal. Mar. 27, 2013). "To establish a *prima facie* case,
 23 plaintiffs are not limited to evidence that meets the standards of admissibility, but rather, they may
 24 rest their argument on their pleadings, bolstered by such affidavits and other written materials as

25 ² In its response to the Court's Order to Show Cause, Plaintiff alleges that the amount of
 26 money for which Plaintiff might be liable to Sykes for because of Defendant's nonparticipation
 27 could range anywhere from \$1,000,000 to \$4,362,090.34. Docket No. 27 at 2-3. The Court
 28 expresses no opinion on the merits or value of the underlying state litigation; however, the Court
 finds this showing sufficient to satisfy the amount in controversy requirement of diversity
 jurisdiction under 28 U.S.C. § 1332.

1 they can otherwise obtain.” *Heirdorn v. BBD Marketing & Mgmt. Co.*, 2013 WL 6571629, *7
 2 (N.D. Cal. Aug. 19, 2013). Although the Court must generally accept as true factual allegations
 3 in the complaint, “mere ‘bare bones’ assertions of minimum contacts with the forum or legal
 4 conclusions unsupported by specific factual allegations will not satisfy a plaintiff’s pleading
 5 burden.” *Swartz v. KPMG LLP*, 476 F.3d 756, 766 (9th Cir. 2007).

6 Here, Defendant is a revoked Nevada Limited Liability Company, the subject of the underlying
 7 litigation involves business that occurred in the State of Nevada, and the underlying litigation is
 8 being carried out in the Nevada courts. The Court therefore finds that Plaintiff has demonstrated
 9 that personal jurisdiction exists.

10 **III. Default Judgment**

11 Obtaining a default judgment is a two-step process set forth by Rule 55 of the Federal Rules
 12 of Civil Procedure. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). First, “[w]hen a party
 13 against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend,
 14 and that failure is shown by affidavit or otherwise, the clerk must enter the party’s default.” Fed.
 15 R. Civ. P. 55(a). Following the entry of a default, a court may enter a default judgment. Fed. R.
 16 Civ. P. 55(b). When the party seeking a default judgment is not seeking a certain sum of money,
 17 the party “must apply to the court for a default judgment.” Fed. R. Civ. P. 55(b)(2).

18 A defendant’s default alone does not entitle the movant to a court-ordered judgment. *See*
 19 *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (per curiam); *see also PepsiCo., Inc. v. Cal.*
 20 *Sec. Cans.*, 238 F. Supp. 2d 1172, 1174 (C.D. Cal. 2002). The choice of whether to enter a default
 21 judgment lies within the discretion of the Court. *Aldabe*, 616 F.2d at 1092. In determining whether
 22 a default judgment is appropriate, the Court considers the seven factors set forth in *Eitel v. McCool*.

23 The Court must consider: (1) the possibility of prejudice to plaintiff if default judgment is not
 24 entered; (2) the merits of the claims; (3) the sufficiency of the complaint; (4) the amount of money
 25 at stake; (5) the possibility of a dispute concerning material facts; (6) whether default was due to
 26 excusable neglect; and (7) the strong public policy favoring decisions on the merits. *Eitel*, 782
 27 F.2d at 1471-72. In evaluating these factors, The Court will take as true all the factual allegations
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1 in the complaint, except those relating to damages. *See e.g., TeleVideo Sys., Inc. v. Heidenthal*,
2 862 F.2d 915, 917-18 (9th Cir. 1987) (per curiam).

3 As discussed below, the Court finds that the *Eitel* factors weigh in Plaintiff's favor.

4 1. The possibility of prejudice to the Plaintiff

5 The first *Eitel* factor weighs in favor of granting default judgment. Defendant's failure to
6 respond to Plaintiff's complaint or otherwise appear in this matter has prejudiced Plaintiff's ability
7 to pursue its claim on the merits. *See e.g., Bank of Am., N.A. v. Terraces At Rose Lake Homeowners*
8 *Ass'n*, 2018 WL 4778033, at *4 (D. Nev. Oct. 2m, 2018) (vacated on other grounds); *Tropicana*
9 *Ent., Inc. v. N3A Mfg., Inc.*, 2018 WL 2088871 (D. Nev. May 3, 2018). If default judgment is not
10 granted, Plaintiff would have no other recourse for recovery and would be required to continue to
11 indemnify and defend Defendant in the underlying state court action. Plaintiff would be potentially
12 liable for at least \$1,000,000 in indemnification costs. Further, Plaintiff would be required to
13 continue to pay significant legal fees throughout the remainder of the state court litigation. There
14 is sufficient indicia that Plaintiff would be prejudiced absent an entry of default judgment in this
15 matter.

16 2. The merits of the claims and the sufficiency of the complaint

17 The second and third *Eitel* factors look at the underlying claims being raised by the party
18 seeking default and whether the plaintiff "state[s] a claim on which the plaintiff can recover."
19 *Danning v. Lavine*, 572 F.2d 1386, 1389 (9th Cir. 1978); *see also* Fed. R. Civ. P. 8. The underlying
20 issue at the heart of this declaratory judgment action is a dispute about the satisfaction of a
21 condition precedent in an insurance contract. Failure to abide by this condition precedent allows
22 an insurance provider to disclaim coverage under Nevada law. *See e.g., Valentine v. State Farm*
23 *Mut. Auto. Ins. Co.*, 105 F.Supp.3d 1176, 1183-84 (D. Nev. 2015; *Schwartz v. State Farm Mut.*
24 *Auto. Ins. Co.*, 2009 WL 2197370, at *7 (D. Nev. July 23, 2009). Plaintiff seeks declaratory
25 judgment pursuant to the Declaratory Judgment Act. 28 U.S.C. §2201. Since the Court has
26 jurisdiction over the state contract law claim pursuant to the Court's diversity jurisdiction, this
27 additional remedy is available to Plaintiff.
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1 Plaintiff specifically seeks a declaration that Defendant is no longer covered by the insurance
2 policy. Docket No. 1 at 4. In support of this, Plaintiff alleges Defendant's failure to satisfy the
3 participation condition. Docket No. 1 at 4. Plaintiff specifically asserts that Defendant both failed
4 and refused to comply with its duty to cooperate with Plaintiff in the investigation and defense of
5 the underlying claim. *Id.* at 3. Plaintiff demonstrates that Defendant's counsel withdrew on
6 multiple occasions because of Defendant's non-cooperation in its own representation in the
7 underlying litigation. Docket No. 25-2, 25-3. Plaintiff also provides information about the
8 underlying litigation in the Nevada Supreme Court where that Court noted that Defendant was not
9 participating in its own defense. *Atlantic Specialty Ins. Co. v. The Eighth Judicial Dist. Ct.*, Case
10 No. 81418, Order Granting Petition (Nev. Sup. Ct. Mar. 26, 2021); *see* Docket No. 1-3.

11 The Court is required to accept the factual allegations set forth in the complaint as true upon
12 the entry of default. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1986). The
13 Court finds that these initial allegations and the further information provided in the application for
14 default judgment support a finding that Plaintiff has sufficiently plead a meritorious claim in its
15 complaint. Thus, the second and third *Eitel* factors weigh in favor of granting a default judgment
16 for Plaintiff.

17 3. The amount of money at stake

18 The fourth *Eitel* factor weighs in favor of granting a default judgment. Plaintiff seeks
19 declaratory relief from the policy requiring Plaintiff to defend the state court action on behalf of
20 Defendant. Docket No. 1 at 5. Plaintiff is not seeking monetary damages, which supports default
21 judgment. *See Bank of Am., N.A. v. Giavanna Homeowners Ass'n*, 2020 WL 3100826, at *3 (D.
22 Nev. June 11, 2020); *Deutsche Bank Nat'l Trust Co. v. SFR Invs. Pool 1, LLC*, 2020 U.S. Dist.
23 LEXIS 254560, at *4 (D. Nev. Feb. 20, 2020).

24 4. The possibility of a dispute concerning material facts

25 The fifth *Eitel* factor weighs in favor of granting default judgment. The Court finds that the
26 complaint states plausible claims under *Iqbal*, which are supported by the record. Failing to
27 respond to a pleading is treated as an admission of the contents of that pleading under the Federal
28 Rules of Civil Procedure. Fed. R. Civ. P. 8(b)(6). Since Defendant failed to respond to Plaintiff's

1 complaint, no dispute exists as to any of the material facts set forth in Plaintiff's complaint.
2 Defendant is deemed to have admitted all the facts and the Court is required to take all well pleaded
3 facts in the complaint as true after the entry of default. *TeleVideo Sys., Inc. v. Heidenthal*, 826
4 F.2d 915, 917-18 (9th Cir. 1986).

5 5. Whether default was due to excusable neglect

6 The sixth *Eitel* factor weighs in favor of granting a default judgment for Plaintiff. The factor
7 favors entry of default judgment when Defendant has been properly served or Plaintiff shows that
8 Defendant is aware of the lawsuit and failed to answer. *Meadows v. Dominican Republic*, 817 F.2d
9 517, 521 (9th Cir. 1987). Plaintiff effectuated service on Defendant's registered agent on July 10,
10 2021. *See* Docket No. 19, 21. Defendant has yet to file a responsive pleading or appear in this
11 case in any manner. *See* Docket. Defendant has not sought an extension or provided the Court
12 with any reason to believe that excusable neglect exists for this failure to interact with the ongoing
13 litigation. Further, Defendant has failed to participate in the underlying litigation, *see* Docket No.
14 1-4. The Court finds that this pattern of non-participation without justification demonstrates that
15 excusable neglect for default does not exist.

16 6. The strong public policy favoring decisions on the merits

17 The seventh *Eitel* factor also weighs in favor of entering default judgment on behalf of Plaintiff.
18 There is a strong preference against default judgment and "cases should be decided on the merits
19 wherever reasonably possible." *Eitel*, 782 F.2d at 1472. The Court notes the difficulty in deciding
20 a case on the merits when one party wholly fails to participate or even acknowledge the litigation.
21 There can be no meaningful adjudication on the underlying facts and their application to the case
22 at hand. In absence of participation by Defendant, it would be virtually impossible to properly
23 decide this case on the merits.

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1 **IV. Conclusion**

2 Accordingly, for the reasons stated above, the Court **RECOMMENDS** that Plaintiff's
3 motion for entry of default judgment be **GRANTED**. Docket No. 25.

4 IT IS SO ORDERED.

5 Dated: September 9, 2021

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Nancy J. Koppe
United States Magistrate Judge